No. 12183

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE B. MCCLYMAN, ELIZABETH SPENCER SAUERS, ELIZABETH BRAU and WILLIS N. URIE,

Appellants,

vs.

WILBERT C. HAMILTON,

Appellee.

Appellants' Supplemental Brief Submitted in Compliance With Court Order Made on December 8, 1949.

H. H. SLATE and
GLENN A. LANE,
1115 Stock Exchange Building, Los Angeles 14.
Attorneys for Petitioning Creditors.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Statement of Points Treated in the Within Brief.

This supplemental brief is herewith submitted, in compliance with this Court's order made on December 8, 1949, wherein this Court instructed both parties to submit a supplemental brief on the sole point raised at the hearing on said date by appellee, that:

Petitioning creditors herein did not have claims FIXED AS TO LIABILITY and LIQUIDATED AS TO AMOUNT, as to the appellee WILBERT C. HAMILTON.

Supplemental Statement of the Case.

On page two of Appellants' opening brief, it is stated that "A number of persons, in excess of sixty-five, had invested monies in said partnership through the solicitation, personal and by agent, of respondent." These invested monies formed the claims of each of the petitioning creditors. At the trial of the action, there was introduced into evidence written agreements between Appellee Wilbert C. Hamilton on behalf of investors, and the said partnership known as BRUNSON AND BUNCH. In said agreements [Respondents' Exhibits Nos. 32 and 36] it was provided that the said partnership would pay to the said WILLIAMS, as such agent, for the use and benefit of said investors, forty per cent of the profits that were earned by the use of said monies, and that the said partnership indemnified said investors against all losses that might occur.

No denial was ever made by any one that the petitioning creditors had not in fact invested with the said partnership stated amounts of money. Each of the petitioning creditors treated as a partial return of capital all payments made to him by the partnership, and deducted the same from his total investment, in arriving at the amount of his claim.

Argument.

"FIXED AS TO LIABILITY AND LIQUIDATED AS TO AMOUNT" was first incorporated into the Bankruptcy Act by the Act of 1938. This introduced a new concept which a petitioning creditor must hurdle in order to qualify as such in an involuntary petition. This particular phase of the Act has received very little attention from the appellate courts; however, the matter is very extensively treated in Collier on Bankruptcy, 14th Edition, Volume 3, Section 59.14, page 581, *et seq.* The matter received thorough consideration in the case of "In the Matter of Beechwood, District Court of New Jersey, 1940, 36 Fed. Supp. 140." The petitioning creditor in the *Beechwood* case was a surety on a bond, covering the employee Beechwood. Beechwood converted various sums of money to his own use and the petitioning creditor was called upon by Beechwood's employer to indemnify under the bond. The argument was made that these amounts could not qualify as liquidated amounts, nor were they fixed as to liability, within the meaning of the phrase, that was imported into the Bankruptcy Act by the Amendemnt of 1938. The Court had the following to say:

> "In support of the contention that this petition is defective because it has not been reduced to judgment, the alleged bankrupt cites the report of the master dismissing creditors' petition in the case of In re Fowler. Therein, the petitioners claimed damages for the anticipatory breach of executory contracts, and the master concluded that Section 59, sub. b. of the Bankruptcy Act, *supra,* intended to exclude all claims whose amounts had not been determined by some sort of adjudication or by agreement between the parties. However, the nature of the claims were obviously not fixed and liquidated.

"Herein, we are only permitted to examine the record before us. The fact that these claims may be flexible and unliquidated are based upon assumptions extrinsic to the record.

"This petition is not distinguishable from one alleging a debt created by reason of goods sold and delivered and services rendered under contract, or the existence of a book account, etc. A tortious quality, indeed, enters into the nature of the claim, because it arises out of the alleged conversion by Beechwood. However, it is not the type of tort that must await juridical award to fix liability and the amount of damages as in the case of an injury to person or property, or the taking of money's worth. Here the taking is expressed in a fixed amount of money. On a motion to dismiss we cannot take cognizance of the fact that the alleged bankrupt may have defenses to the whole or part of petitioner's claim. This is a matter that can be determined only after issue is raised by answer. Confined to the petition as we are, we believe that the petitioning creditor has a claim fixed as to liability and liquidated as to amount."

Appellants submit that there is no distinction in principle between their position as petitioning creditors herein, and the surety as petitioning creditor in the *Beechwood* case. The liability is fixed both under the bond in the *Beechwood* case, and the contracts between the partnership, and the investors, in the within action. They are definite as to amount in both situations because that is definite which may be made definite by computation. A further analogy may be found in the common law action of debt, in that an action of debt will lie where the plaintiff's claim can be reduced to certainty by arithmetical computation.

In the 1949 Cumulative Supplement to Collier on Bankruptcy, 14th Edition, Volume 3, Section 59.14, at page 51, *et seq.,* there are to be found additional cases on this point. In the *Matter of Garrett and Co.,* C. C. A. 7, 1943, 134 F. 2d 227, we have the situation of an accountant's having rendered services as such, filing as a petitioning creditor, and the court held, correctly so, that he could not qualify because his claim was in doubt as to the reasonable worth of the services and the extent of the services rendered, and it could not be determined whether they were worth in excess of $500.00.

In the *Matter of Central Illinois Oil and Refining Company,* C. C. A. 7, 1943, 133 F. 2d 657, we have the situation of a secured creditor, having the security of a chattel mortgage for the major portion of the claim, and having several hundred dollars in the form of an unsecured claim. The creditor filed an involuntary petition without mentioning the security and the Court held that inasmuch as he had waived the preferred position as security-holder, by his failure to mention and claim his security, the entire sum would be treated as an unsecured claim, and therefore he would qualify as having a claim liquidated as to amount and fixed as to liability.

In the case of *In re Myers,* 31 Fed. Supp. 636, the Court held that the balance due on a promissory note, although not payable at the time of filing the petition, would qualify as liquidated in amount and fixed as to liability, the court saying (p. 638) that, "the debt seems to be a provable one . . . it is a fixed liability as evidenced by instrument in writing, and it is absolutely owing when the petition was filed, whether then payable or not."

In the case of *Winkleman v. Ogami* (C. C. A. 9, 1941), 123 F. 2d 78, wherein two of the three petitioning creditors had received voidable preferences and had made no offer to return them, Judge Healy said (p. 80): "On its face, the Statute is plain. A creditor who has received a voidable preference may nevertheless prove his claim, although it may not be allowed unless the preference is surrendered or except upon condition that it be surrendered. . . ."

The partnership of BRUNSON & BUNCH, as such, was adjudicated a bankrupt in November of 1947, and by reason thereof, the fact of the petitioning creditors having been investors in the partnership and their investments being fixed as to liability and liquidated as to amount is a closed matter. The adjudication of bankruptcy is now final. The ONLY issues at the trial of this matter was whether WILBERT C. HAMILTON was a partner in the adjudicated bankrupt partnership and if so, whether he was insolvent.

Respectfully submitted,

H. H. SLATE and
GLENN A. LANE,
Attorneys for Petitioning Creditors.